Petition

81-2000

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ALEXANDER L. STEVAS
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IN THE
SUPREME COURT OF THE UNITED STATES

.....Term, 19.....

No.

THE THOMAS MERTON CENTER,
Petitioner,

v.

ROCKWELL INTERNATIONAL CORPORATION, and CROSBY M. KELLY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

E.F. Welsh, Esq.
Vincent A. Colianni, Esq.
PARMELEE, MILLER,
WELSH & KRATZ, P.C.
Attorneys for Petitioner

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QUESTION PRESENTED FOR REVIEW

Whether allegations published by the Associated Press that opponents of the B-1 Bomber production are being secretly funded by the Soviet Union are capable of defamatory meaning?

PARTIES TO THE PROCEEDING BELOW

The caption of this case before the Supreme Court of Pennsylvania was:

THE THOMAS MERTON CENTER, a nonprofit Pennsylvania corporation and the STOP THE B-1 BOMBER TASK FORCE OF THE THOMAS MERTON CENTER, an unincorporated nonprofit association,

v.

ROCKWELL INTERNATIONAL CORPORATION, a corporation, and CROSBY M. KELLY, an individual.

However, no appeal was taken on behalf of the STOP THE B-1 BOMBER TASK FORCE OF THE THOMAS MERTON CENTER to the Pennsylvania appellate courts.

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The Supreme Court of Pennsylvania issued an opinion on December 17, 1981. The opinion is reproduced in the Appendix at p. 2a.

The Superior Court of Pennsylvania issued an opinion on August 8, 1980. The official citation is 230 Pa. Super. 222, 421 A.2d 688 (1980). The opinion is reproduced in the Appendix at p. 13a.

The Court of Common Pleas of Allegheny County, Pennsylvania issued an opinion on March 27, 1979. The opinion is reproduced in the Appendix at p. 29a.

STATEMENT OF JURISDICTION

The Supreme Court of Pennsylvania entered its judgment reversing the Superior Court of Pennsylvania on December 17, 1981.

Petitioner's Application for Reargument was denied by the Supreme Court of Pennsylvania on January 29, 1982.

Jurisdiction of the Honorable Court is conferred by Title 28 United States Code, Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. U.S. Const. amend. I.

All persons born or naturalized in the United States, and subject to the jurisdiction theeof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend XIV.

STATEMENT OF THE CASE

During 1976, the production of the B-1 Bomber was a national issue. Rockwell International Corporation, as its prime contractor, was in favor of its production. The Thomas Merton Center, a ministry for justice and peace, was opposed to its production.

An Associated Press article appeared in the PITTSBURGH POST-GAZETTE on December 26, 1976 entitled, "B-1 Foes Linked to Soviet Funds". The article which emanated from a lengthy interview with Crosby M. Kelly, Vice President of Communications for Rockwell reads as follows:

B1 FOES LINKED
TO SOVIET FUNDS

A top official of Rockwell International, prime contractor for the B1 bomber, says he's convinced the Soviet Union is secretly funding opponents of the controversial weapons project.

"Oh absolutely, oh sure," responded Crosby M. Kelly, vice president of communications, when asked during a lengthy interview if the Soviets were providing funds.

Speaking from his office on the 54th floor of Rockwell headquarters in Pittsburhg [sic] last Thursday, Kelly said the firm at one time began a study to establish

the degree to which the Soviets are funding the anti-bomber campaign.

"We called it off--and I want to propose that we pick it up again," he said.

Kelly offered no specific documentation for Soviet activity in the B1 controversy, but he said the Institute for the Study of Conflict in London supports his thesis in general.

Yesterday, when Kelly learned of The Associated Press' imminent story, he called from California to disclaim that he was speaking as a company official.

"That's pretty dramatic stuff. I have no documentation to establish proof of one dime of their funding," he said.

But Kelly did not deny that he believes Soviets are involved financially. "Sure, undoubtedly they are. I say that, but not from any position of authority."

Jamie Lewontin, coordinator of the Clergy and Laity Concerned, A New York-based group Kelly said was leading opposition to the project, called Kelly's position "laughable."

"I am convinced we're getting no funds from the Soviet Union." Lewontin said, adding that the organization received an average of $15 from individuals through a mail order appeal.

"If there's any (Soviet funding), it certainly isn't an appreciable amount," he added.

"I can't understand why he would say that unless it's to discredit us," responded Stella Smetanka, assistant director of the Thomas Merton Center here, another group which Kelly singled out.

Kelly, who calls himself an amateur student of Soviet affairs, said during the interview last week that the anti-B1 bomber efforts are being led by the Clergy and Laity Concerned and the American Friends Service Committee.

The Thomas Merton Center commenced an action for defamation against both Rockwell International Corporation and Crosby M. Kelly in the Court of Common Pleas of Allegheny County, Pennsylvania in February, 1977. Following the close of pleadings, both defendants moved for judgment on the pleadings, which motion was granted on March 27, 1979. On appeal, the Pennsylvania Superior Court reversed and remanded the case to the lower court for further proceedings on August 8, 1980. Rockwell and Kelly petitioned and were granted allocatur to the Pennsylvania Supreme Court. On December 17, 1981, that Court reversed the Pennsylvania Superior Court and reinstated the judgment in favor of Rockwell and Kelly. The Thomas Merton Center's petition for reargument was denied on January 29, 1982.

The federal constitutional question presented to this Court for review was raised by the petitioner in Paragraph 11 of its Complaint filed in the lower

court which reads:

> 11. Plaintiffs and Plaintiffs' members, who are relatively small in number, have been injured in their reputation and good standing in the community wherein they live and reside, and have been impeded in exercising their rights to free speech by the actions of the Defendant.

The questions raised were discussed in the opinions of the courts below which are reproduced in the appendix.

ARGUMENT

The Associated Press article which appeared in the PITTSBURGH POST-GAZETTE discussed Kelly's theory that the Soviet Union was secretly funding opponents of the B-1 bomber. The Thomas Merton Center was singled out as one of the opponents by Kelly. Some of the allegations attributed to Kelly in the article included his response "Oh absolutely, oh sure" when asked if "the Soviets were providing funds." He also stated that Rockwell had once conducted a study "to establish the degree to which the Soviets are funding the anti-bomber campaign" and that he wanted "to propose that we pick it up again." Further, while Kelly admitted he could provide "no specific documentation for Soviet activity" he did not deny that the Soviets are involved financially. "Sure, undoubtedly they are" he was quoted as saying.

Accusations that the opponents of a United States weapons system are being

secretly funded by the country whom the weapons system is primarily designed to defend against suggests betrayal and disloyalty to the United States by those opponents. Such statements damage their credibility and reputation in the community, as well as subject them to public hatred and contempt, and are thereby libelous. Corabi v. Curtis Publishing Company, 441 Pa. 432, 273 A.2d 899, 904 (1971); Birl v. Philadelphia Electric Co., 402 Pa. 297, 167 A.2d 472, 475 (1960). See also Spanel v. Pegler, 160 F.2d 619 (7th Cir. 1947); Grant v. Reader's Digest Association, 151 F.2d 733 (2d Cir. 1945), cert. denied, 326 U.S. 797 (1946).

The Pennsylvania Supreme Court, in reversing the Pennsylvania Superior Court, held that the challenged statements were not defamatory as a matter of law because "...the challenged publication can at most be read to mean that The Thomas Merton Center was the unknowing recipient of Soviet funds." The Court stated that

"...Kelly's failure to charge or imply appellee's knowing participation in the purported funding is fatal to appellee's effort to establish that Kelly's statements are actionable." It then concluded: "Because it is unreasonable to infer from the entire article that appellee was actively and knowingly aiding the Soviet Union, the statements attributed to appellant Kelly are not defamatory as a matter of law."

Kelly's thesis was that the Soviet Union was secretly funding opponents of the B-1, including The Thomas Merton Center. Although the article contained no specific statement about whether The Thomas Merton Center was either the knowing or the unknowing recipient of the Soviet funds, the Court concluded that it was an unknowing recipient. To do so it had to draw an inference that because the funding was secret, it was unknown to The Thomas Merton Center. Yet Webster defines

"secret" as "kept from public knowledge or from the knowledge of a certain person or persons." Webster's New World Dictionary, Second College Edition (1972). Applying this definition, the secret funding could have been known by the Soviets and The Thomas Merton Center and kept from the public, or known by the Soviets and kept from The Thomas Merton Center and the public.

This being an appeal from a granting of a motion for judgment on the pleadings, the Court had an obligation to draw any inferences in favor of the non-moving party, The Thomas Merton Center. Karns v. Tony Vitale Fireworks Corporation, 436 Pa. 181, 259 A.2d 687, 688 (1969). Accordingly, the correct inference in this defamation action was that the secret of the funding was known to the Soviets and to The Thomas Merton Center, but kept from the public. Instead, the Court erroneously chose to exculpate Rockwell and Kelly by

inferring that the "secret" of the funding was known to the Soviets and unknown to The Thomas Merton Center and to the public-thereby making The Thomas Merton Center an unwitting and undefamed recipient of Soviet funds.

The function of the Pennsylvania Supreme Court in reviewing an appeal from a judgment on the pleadings was to determine only whether the statements in the Associated Press article were capable of a defamatory meaning. Bogash v. Elkins, 405 Pa. 437, 176 A.2d 677, 678 (1962). By drawing the erroneous inference regarding the meaning of secret funding by the Soviet Union, the court wrongfully usurped the function of the jury which is to determine whether the statements are defamatory. Corabi, supra at 904.

By its decision that statements identifying persons as being secretly funded by the Soviet Union are not capable of defamatory meaning, the Pennsylvania

Supreme Court has created a conflict with prior Pennsylvania law and the law of other jurisdictions. As The Pennsylvania Superior Court said in this case

> Evaluating the cases in this area Professor Prosser wrote that 'the accusation of membership in the Communist Party, or of Communist affiliation or smypathy, which has led to varying conclusions over the last two decades, is at present all but universally regarded as clearly defamatory.' W. Prosser, Handbook of the Law of Torts S111, at 744 (4th ed. 1971)(footnotes omitted).

See also Herrmann v. Newark Morning Ledger Co., 48 N.J. Super. 420, 138 A.2d 61 (App.Div. 1958), opinion after rehearing, 49 N.J. Super. 551, 140 A.2d 529 (App. Div. 1958); Toomey v. Farley, 2 N.Y. 2d 71, 138 N.E. 2d 221 (1956).

The Soviet Union has been referred to as the arch Communist country, Clark v. Allen, 415 Pa. 484, 495, 204 A.2d 42 (1964). Being funded by them clearly implies an affiliation or sympathy, particularly in the context of the recipient being connected with opposition to a weapons system allegedly being produced to

deter Soviet aggression. The statements are thereby capable of defamatory meaning.

Kelly's statements were made in response to statements and actions by The Thomas Merton Center and others in protest of the development of the B-1 bomber who were exercising their First Amendment rights. Kelly's critical statements effectively inhibited the exercise of this right by discrediting the protesters and their actions.

What better way for the respondents to silence opposition to a project for which they anticipated significant profits than to make reckless and false charges against the opposition, discrediting them and their efforts in the eyes of the public, and further obfuscating the real issues by suggesting that the Soviet Union itself was actively involved in the controversy.

Kelly's statements do not purport to address the merits of the B-1 con-

troversy itself. Instead, his statements were a personal attack on those on the other side of his employer in the controversy. How can we have an uninhibited, robust and wide-open debate on public issues if those on either side of a controversy can ignore the real issues and make false and defamatory statements.

With the right of free speech guaranteed under the First and Fourteenth Amendments comes the responsibility not to abuse this freedom. As this Court stated in Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1970), "there is no constitutional value in false statements of fact." Intentional lies or careless errors do not advance society's interest in wide-open debate on public issues. Any slight social value or benefit that may be derived from these false utterances is clearly outweighed by social interest in order and morality. Gertz, supra at 340; Chaplinsky v. New Hampshire, 315 U.S.

568 (1942). If Rockwell is permitted to abuse its freedom of speech and irresponsibly attack and falsely malign its opponents with impunity, the effects are to interfere with and inhibit the full expression of freedom of speech by those opponents. Such a decision is constitutionally deficient for failure to provide adequate safeguards for freedom of speech as required by the First and Fourteenth Amendments to the Constitution.

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that this Petition for a Writ of Certiorari to the Pennsylvania Supreme Court should be granted.

Respectfully submitted,

PARMELEE, MILLER, WELSH & KRATZ, PC

By E. F. Welsh
E.F. Welsh

By Vincent A. Colianni
Vincent A. Colianni

Attorneys for
THE THOMAS MERTON CENTER

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of April, 1982, three (3) true and correct copies of the foregoing PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, were served on each of the individuals and in the manner indicated below, which service satisfies the requirements of Rule 28 of the United States Supreme Court Rules.

SERVICE BY FIRST CLASS UNITED STATES MAIL, POSTAGE PREPAID:

1. Joseph A. Katarincic, Esq.
   Kirkpatrick, Lockhart, Johnson & Hutchison
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   Pittsburgh, PA 15222
   (Counsel for Rockwell International Corporation)

2. James D. Morton, Esq.
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   (Counsel for Crosby M. Kelly)

PARMELEE, MILLER, WELSH & KRATZ, PC

By E. F. Welsh

E.F. Welsh
Attorney for
THE THOMAS MERTON CENTER

Appendix

SUPREME COURT OF PENNSYLVANIA

January 29, 1982

Vincent A. Colianni, Esquire
PARMELEE, MILLER, WELSH & KRATZ, PC
Suite 721
301 Fifth Avenue Building
Pittsburgh, PA 15222

In Re: The Thomas Merton Center, et al.
v. Rockwell International
Corporation, et al.
Nos. 81-1-9 and 81-1-10

Dear Mr. Colianni:

The Court has entered the following Order on your Application for Reargument:

"ORDER OF COURT

January 29, 1982
Application Denied.

PER CURIAM"

Very truly yours,

/s/

Carl Rice
Prothonotary

CR:kde

cc: James D. Morton, Esquire
Joseph A. Katarincic, Esquire
Thomas R. Johnson, Esquire

IN THE SUPREME COURT OF PENNSYLVANIA
Western District

THE THOMAS MERTON CENTER, a nonprofit Pennsylvania Corporation, and the STOP THE B-1 BOMBER TASK FORCE OF THE THOMAS MERTON CENTER, an unincorporated nonprofit association,	Nos. 81-1-9, 81-1-10
V.	Appeal from the Order of the Superior Court entered August 8, 1980 at No. 394 April Term, 1979, reversing the order of the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division, at No. GD77-03656.
ROCKWELL INTERNATIONAL CORPORATION, a corporation, and CROSBY M. KELLY, an individual, Appellants	ARGUED: September 15, 1981.

OPINION OF THE COURT

ROBERTS, J. FILED: DECEMBER 17, 1981

Appellant Rockwell International Corporation is the prime contractor for the B-1 bomber project. Appellant Crosby M. Kelly was Vice-President of Communications for Rockwell. They appeal from an order of the Superior Court which reversed an order of the Court of Common Pleas of Allegheny County dismissing a complaint

in libel filed by appellee, the Thomas Merton Center. Appellee is a non-profit Pennsylvania corporation, some of whose members actively campaigned against the United States government's proposed development of the B-1 bomber.

The trial court granted relief to appellants on the ground that the challenged publication was not defamatory as a matter of law. In reversing, the Superior Court held that the article was capable of carrying a defamatory meaning. Because we agree with the trial court that the statements attributed to appellant are not defamatory as a matter of law, we reverse the order of the Superior Court.

Appellee's complaint alleges that a newspaper article published by the Pittsburgh Post-Gazette on December 12, 1976, "intended to convey, and did convey to the community at large, the impression that members of the Thomas Merton Center . . . were Communist sympathizers, as-

sociated with Communists or were in fact Communists and . . . was calculated to, and did, hold [Merton] up to public scorn, hatred, [and] ridicule." Appellants denied these allegations and were granted judgment on the pleadings.

The challenged publication follows in its entirety:

B1 FOES LINKED TO SOVIET FUNDS
By the Associated Press

A top official of Rockwell International, prime contractor for the B1 bomber, says he's convinced the Societ [sic] Union is secretly funding opponents of the controversial weapons project.

"Oh absolutely, oh sure," responded Crosby M. Kelly, vice president of communications, when asked during a lengthy interview if the Soviets were providing funds.

Speaking from his office on the 54th floor of Rockwell headquarters in Pittsburgh last Thursday, Kelly said the firm at one time began a study to establish the degree to which the Soviets are funding the anti-bomber campaign.

"We called it off -- and I want to propose that we pick it up again," he said.

Kelly offered no specific documentation for Soviet activity in the B1 con-

troversy, but he said the Institute for the Study of Conflict in London supports his thesis in general.

Yesterday, when Kelly learned of The Associated Press' imminent story, he called from California to disclaim that he was speaking as a company official.

"That's pretty dramatic stuff. I have no documentation to establish proof of one dime of their funding," he said.

But Kelly did not deny that he believes Soviets are involved financially. "Sure, undoubtedly they are. I say that, but not from any position of authority."

Jamie Lewontin, coordinator of the Clergy and Laity Concerned, a New York-based group Kelly said was leading opposition to the project, called Kelly's position "laughable."

"I am convinced we're getting no funds from the Soviet Union." [sic] Lewontin, said, adding that the organization received an average of $15 from individuals through a mail order appeal.

"If there's any (Soviet funding), it certainly isn't an appreciable amount," he added.

"I can't understand why he would say that unless it's to discredit us," responded Stella Smetanka, assistant director of the Thomas Merton Center here, another group which Kelly singled out.

Kelly, who calls himself an amateur student of Soviet affairs, said during the interview last week that the anti-B1 bomber efforts are being led by the Clergy

and Laity Concerned and the American Friends Service Committee.

To sustain its complaint in libel, appellee must establish that the challenged publication is defamatory. Act of August 21, 1953, P.L. 1291, § 1, formerly 12 P.S. § 1584(a), now 42 Pa. C.S. § 8343(a)(1). Under Pennsylvania law,

> "'[a] communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.'"

Birl v. Philadelphia Electric Co., 402 Pa. 297, 303, 167 A.2d 472, 475 (1960), quoting Restatement of Torts § 559 (1938). Accord, Baird v. Dun & Bradstreet, Inc., 446 Pa. 266, 285 A.2d 166 (1971); Corabi v. Curtis Publishing Co., 441 Pa. 432, 273 A.2d 899 (1971); Cosgrove Studio & Camera Shop, Inc. v. Pane, 408 Pa. 314, 182 A.2d 751 (1962); Restatement (Second) of Torts § 559 (1977). It is the function of the court to determine whether the

challenged publication is capable of a defamatory meaning. If the court determines that the challenged publication is not capable of a defamatory meaning, there is no basis for the matter to proceed to trial. Restatement (Second) of Torts, supra, § 614(1). Accord, Corabi, supra; Volomino v. Messenger Publishing Co., 410 Pa. 611, 189 A.2d 873 (1963); Cosgrove, supra.

In this case, the entire controversy centers on the interpretation of the accusation in the first paragraph of the article that the Soviet Union was "secretly funding" opponents of the B-1 bomber. Joining this statement with the penultimate paragraph of the article, where Kelly is quoted as identifying the Thomas Merton Center as one of the groups opposed to the B-1 bomber project, appellee reads the entire article to charge that the Thomas Merton Center was an agent of the Soviet government.

If these two paragraphs of the article constituted the entire story published by the Post-Gazette, the innuendo urged by appellee might be reasonable. However, "[w]ords which standing alone may reasonably be understood as defamatory may be so explained or qualified by their context as to make such an interpretation unreasonable." Restatement (Second) of Torts, supra, § 563 Comment d. Thus, we must consider the full context of the article to determine "the effect the article is fairly calculated to produce, the impression it would naturally engender, in the minds of the average persons among whom it is intended to circulate." Corabi, supra, 441 Pa. at 447, 273 A.2d at 901, quoting Boyer v. Pitt Publishing Co., 324 Pa. 154, 157, 188 A. 203, 204 (1936).

Here, Kelly's allegations focus on the purported actions of the Soviet Union and not those of appellee. For example, Kelly responded "[o]h, absolutely,

oh sure" when he was asked if "the Soviets were providing funds" to opponents of the B-1 bomber. Kelly, who described himself as "an amateur student of Soviet affairs" also stated that Rockwell had once conducted a study to investigate "the degree to which the Soviets are funding the anti-bomber campaign." Further, while Kelly admitted he could provide "no specific documentation for Soviet activity" he "did not deny that he believes Soviets are involved financially." The Thomas Merton Center is not even mentioned until the next to last paragraph in the article.

Moreover, absent here is any statement by appellant Kelly that either alleges or can reasonably be read to allege that the Thomas Merton Center had knowledge of the purported funding. Indeed, even the coordinator of the organization singled out by Kelly as "leading opposition to the project" understood Kelly's remarks to mean that his group was merely the

unwitting recipient of Soviet funds: "'I am convinced we're getting no funds from the Soviet Union. . . . If there's any (Soviet funding), it certainly isn't an appreciable amount.'"

Although it is true that a publication is defamatory if it ascribes to another "conduct, character or a condition that would adversly [sic] affect his fitness for the proper conduct of his lawful business, trade or profession" [sic] Restatement (Second) of Torts, supra, § 573 (1977), the Thomas Merton Center is not clothed with any special status which would make the suggestion of unknowing receipt of funds harmful to its reputation. Our case law makes clear that Kelly's failure to charge or imply appellee's knowing participation in the purported Soviet funding is fatal to appellee's effort to establish that Kelly's statements are actionable. Thus, here this Court has held a letter actionable

where the letter stated that the plaintiff had consciously participated in various communist organizations and had attended school at the Young Communist League. Matson v. Margiotti, 371 Pa. 188, 88 A.2d 892 (1952). See also Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 99 S.Ct. 2701 (1979)(plaintiff labeled "Soviet Agent"). On the other hand, in Clark v. Allen, 415 Pa. 484, 204 A.2d 42 (1964), the statement that a United States Senator's voting record reflected "Communist tendencies" was held not to be libelous as a matter of law. The statement in Clark, read in the worst possible light, simply implied that Clark had unsuspectingly aided Communism through his Senate votes.

So too, here, the challenged publication can at most be read to mean that the Thomas Merton Center was the unknowing recipient of Soviet funds. This article can not [sic] be rendered libelous "by an innuendo which puts an unfair and

forced construction on the interpretation of the publication." Sarkees v. Warner-West Corp., 349 Pa. 365, 369, 37 A.2d 544, 546 (1944). An innuendo must be warranted, justified and supported by the publication. Bogash v. Elkins, 405 Pa. 437, 176 A.2d 677 (1962). Because it is unreasonable to infer from the entire article that appellee was actively and knowingly aiding the Soviet Union, the statements attributed to appellant Kelly are not defamatory as a matter of law.

Accordingly, the order of the Superior Court is reversed and judgment in favor of appellants is reinstated.

Mr. JUSTICE NIX did not participate in the consideration or decision of this case.

SUPERIOR COURT OF PENNSYLVANIA
PITTSBURGH OFFICE

THE THOMAS MERTON CENTER, a nonprofit Pennsylvania corporation and the STOP THE B-1 BOMBER TASK FORCE OF THE THOMAS MERTON CENTER, an unincorporated nonprofit association,	:	No. 394 APRIL TERM, 1979
v.	:	
ROCKWELL INTERNATIONAL CORPORATION, a corporation, and CROSBY M. KELLY, an individual,	:	
APPEAL OF THOMAS MERTON CENTER	:	

ORDER

AND NOW, this 8th day of August, 1980, it is ordered as follows:

_____Order Affirmed

__X__ Order Reversed. Case remanded for further proceedings.

_____Order Vacated and lower court directed to proceed in accordance with opinion filed herewith.

_____Order Modified as set forth in opinion filed herewith.

_____Ordered as set forth in opinion filed herewith.

_____Costs to be taxed as provided by Chapter 27 of the Pa. R. A. P.

_____Costs to be taxed as provided in opinion filed herewith.

_____Judgment of Sentence Affirmed.

BY THE COURT

/s/
Deputy Prothonotary

NOTE: Unless another date is hereinafter set forth, the foregoing Order was entered on the docket on the date set forth above.
Order entered: 1a

THE THOMAS MERTON CENTER, a nonprofit Pennsylvania corporation and the STOP THE B-L BOMBER TASK FORCE OF THE THOMAS MERTON CENTER, an unincorporated nonprofit association,	:IN THE SUPERIOR :COURT OF PENNSYLVANIA
v.	
ROCKWELL INTERNATIONAL CORPORATION, a corporation, and CROSBY M. KELLY, an individual,	
APPEAL OF THE THOMAS MERTON CENTER	:No. 394 April Term, 1979

Appeal from the Order of the Court of Common Pleas of Allegheny County, Civil Division, at No. GD 77-03656.

Before: SPAETH, HOFFMAN and VAN DER VOORT, JJ.

OPINION BY HOFFMAN, J.: FILED: AUGUST 8, 1980

Appellant contends that the lower court erred in granting judgment on the pleadings in favor of appellee in this defamation action. We agree and, accordingly, reverse the order of the lower court and remand for further proceedings.

Under Pa. R.C.P. 1034, a motion for judgment on the pleadings may be

granted in cases which are so free from doubt that a trial would clearly be a fruitless exercise. Such a motion is in the nature of a demurrer; all of the opposing party's well-pleaded allegations are viewed as true but only those facts specifically admitted by him may be considered against him.... Unlike a motion for summary judgment, the power of the court to enter a judgment on the pleadings is further circumscribed by the requirement that the court consider only the pleadings themselves and any documents properly attached thereto.

Bata v. Central-Penn National Bank of Philadelphia, 423 Pa. 373, 378, 224 A. 2d 174, (1966), cert. denied, 386 U.S. 1007 (1967) (footnote and citations omitted). See also Karns v. Tony Vitale Fireworks Corp., 436 Pa. 181, 259 A. 2d 687 (1969); Beckman v. Dunn, Pa. Superior Ct. , A. 2d (J. 1083/79, filed April 11, 1980); Leidy v. Deseret Enterprises, Inc., 252 Pa. Superior Ct. 162, 381 A.2d 164 (1977). Moreover, in passing on a motion for judgment on the pleadings, a court has the "obligation to consider the pleadings and the inferences therefrom in the light most favorable to the [nonmoving party]." Karns

v. Tony Vitale Fireworks Corp., supra at , 259 A. 2d at 688. Viewed in this light the pleadings in this case disclose the following facts. Appellant, the Thomas Merton Center (Merton), is a nonprofit corporation, some of whose members worked actively in 1976 to oppose the United States' development of a controversial military aircraft known as the B-1 bomber.[1] At the time this action was instituted appellee Crosby M. Kelly (Kelly) served as vice president of communications for appellee Rockwell International Corporation (Rockwell), the prime contractor for the B-1 bomber project. On December 21, 1976, the Pittsburgh Post Gazette, a newspaper of general circulation in the Pittsburgh area, published an article written by the Associated Press entitled "B1 Foes

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1. Those members formed an unincorporated association called the "Stop the B-1 Bomber Task Force" (Task Force) which joined Merton as a plaintiff in the lower court. The Task Force has not appealed from the order granting judgment on the pleadings to appellees.

Linked to Soviet Funds." The article, in relevant part, reads as follows:

A top official of Rockwell International, prime contractor for the B1 bomber, says he's convinced the Soviet Union is secretly funding opponents of the controversial weapons project.

"Oh absolutely, oh sure," responded Crosby M. Kelly, vice president of communications, when asked during a lengthy interview if the Soviets were providing funds....

Kelly offered no specific documentation for Soviet acitivity in the B1 controversy, but he said the Institute for the Study of Conflict in London supports his thesis in general.

Yesterday, when Kelly learned of The Associated Press' imminent story, he called from California to disclaim that he was speaking as a company official.

"That's pretty dramatic stuff. I have no documentation to establish proof of one dime of their funding," he said.

But Kelly did not deny that he believes Soviets are involved financially. "Sure, undoubtedly they are. I say that, but not from any position of authority."...

"I can't understand why he would say that unless it's to discredit us," responded Stella Smetanka, assistant director of the Thomas Merton Center here, another group which Kelly singled out.

Following publication of this article Merton filed a complaint in

trespass against both Rockwell and Kelly in which it alleged that the article

> was intended to convey, and did convey to the community at large, the impression that members of ... Merton ... were Communist sympathizers, associated with Communists or were in fact Communists and ... was calculated to, and did, hold [Merton] up to public scorn, hatred, [and] ridicule.

Both Rockwell and Kelly denied these allegations and subsequently moved for judgment on the pleadings, contending that the statements attributed to Kelly were not defamatory as a matter of law and did not identify Merton sufficiently to sustain its claim of defamation. The lower court agreed that the statements were not defamatory as a matter of law and granted judgment on the pleadings in favor of Rockwell and Kelly. This appeal followed.

As the lower court correctly noted, it is the duty of the trial court, "in the first instance, to determine whether the communication complained of is capable of a defamatory meaning. ...If

the court determines that the statement is capable of a defamatory meaning, it is for the jury to determine whether it was so understood by the recipient." Corabi v. Curtis Publishing Co., 441 Pa. 432, , 273 A. 2d 899, 904 (1971) (citations omitted). See also Cosgrove Studio and Camera Shop, Inc. v. Pane, 408 Pa. 314, 182 A. 2d 751 (1962); Vitteck v. Washington Broadcasting Co., 256 Pa. Superior Ct. 427, 389 A. 2d 1197 (1978); Doman v. Rosner, 246 Pa. Superior Ct. 616, 371 A. 2d 1002 (1977).

> A libel is "a maliciously written or printed publication which tends to blacken a person's reputation or to expose him to public hatred, contempt, or ridicule, or to injure him in his business or profession." Corabi v. Curtis Publishing Co., 441 Pa. 432, 441, 273 A. 2d 899, 904 (1971); Volomino v. Messenger Publishing Co. 410 Pa. 611, 613, 189 A. 2d 873, 874-75 (1963). A communication is defamatory if it tends to harm the reputation of another so as to lower him in the estimation of the community or deter third persons from associating or dealing with him, Cosgrove Studio and Camera Shop, Inc. v. Pane, 408 Pa. 314, 182 A. 2d 751 (1962), and necessarily involves the idea of disgrace. Vitteck v. Washington Broadcasting Co., 256

> Pa. Superior Ct. 427, 389 A. 2d 1197 (1978). "'The test is the effect the [statement] is fairly calculated to produce, the impression it would naturally engender, in the minds of the average persons among whom it is intended to circulate.'" Corabi v. Curtis Publishing Co., supra at 447, 273 A. 2d at 907, quoting, Boyer v. Pitt Publishing Co., 324 Pa. 154, 157, 188 A. 203, 204 (1936).

Beckman v. Dunn, Pa. Superior Ct. , , A. 2d , slip opinion at 4 (J. 1083/79, filed April 11, 1979).

In Clark v. Allen, 415 Pa. 484, 204 A. 2d 42 (1964), Chief Justice BELL observed that "[c]ertain charges or accusations have been determined by this Court to be libelous. We have decided that calling or referring to any American citizen as a Communist, or knowingly a member of a Communist organization, or engaging in Communist activities, is libelous per se: Matson v. Margiotti, 371 Pa. 188, 193, 88 A. 2d 892 [1952]; Albert Appeal, 372 Pa. 13, 92 A. 2d 663 [1952]." 415 Pa. at 496, 204 A. 2d at (BELL, C.J.)

(emphasis in original). See also Solosko v. Paxton, 383 Pa. 419, 119 A. 2d 230 (1956), aff'g 4 Pa. D. & C. 2d 240 (Somerset County 1954)(statements that plaintiff was communist held capable of defamatory meaning); Americans for Democratic Action v. Meade, 72 Pa. D. & C. 306 (Phila. County 1950)(statements that plaintiff association "has Communist members, harbors Communists, espouses Communist doctrines, is influenced in its policies by Communists or Communism, and that candidates for public office supported by [it] were consequently receiving support from Communists," id. at 309, held reasonably capable of defamatory meaning). But see Clark v. Allen, supra (Opinion of BELL, C.J.) (not libelous to write of U.S. Senator that his voting record displayed "communist tendencies"); McAndrew v. Scranton Republication Publishing Co., 364 Pa. 504, 72 A. 2d 780 (1950)(not libelous for newspaper to erroneously quote plaintiff as saying, "of course, we all have to have

a little Communism today"). Cases in numerous other jurisdictions have held statements identifying persons as communists or associating them in some manner with communism to be defamatory. See; e.g., Spanel v. Pegler, 160 F. 2d 619 (7th Cir. 1947); Grant v. Reader's Digest Association, 151 F.2d 733 (2d Cir. 1945), cert. denied, 326 U.S. 797 (1946); Herrmann v. Newark Morning Ledger Co., 48 N.J. Super. 420, 138 A.2d 61 (App. Div. 1958), opinion after rehearing, 49 N.J. Super. 551, 140 A. 2d 529 (App. Div. 1958); Toomey v. Farley, 2 N.Y. 2d 71, 138 N.E. 2d 221 (1956). See generally Annot., 33 A.L.R. 2d 1196 (1954). Evaluating the cases in this area Professor Prosser wrote that "the accusation of membership in the Communist party, or of Communist affiliation or sympathy, which has led to varying conclusions over the last two decades, is at present all but universally regarded as clearly defamatory." W. Prosser, Handbook of the Law of Torts §111, at 744 (4th ed. 1971)(footnotes omitted).

In the present case Merton alleged in its complaint that Kelly responded affirmatively when asked whether the Soviet Union was secretly funding opponents of the B-1 bomber, reasserted in a later interview that such funding was taking place, and "singled out" Merton as one of the B-1 bomber opponents to whom he had been referring.[2] Viewing these allegations as true, as we must where judgment on the pleadings has been granted, Karns v. Tony Vitale Fireworks Corp., supra, we conclude that the lower court erred in granting judgment on the pleadings to Rockwell and Kelly. It is conceivable, even likely, that some readers of the Pittsburgh Post Gazette believed after reading the statements attributed to Kelly that Merton or

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2. Accordingly, there is no question that Merton was sufficiently identified in the allegedly defamatory statements to maintain this action. See Farrell v. Triangle Publications, Inc., 399 Pa. 102, , 159 A. 2d 734, 737 (1960)("[I]f the defamatory publication can reasonably be interpreted as referring to a particular complainant, whether recipients did so conclude is for a jury to determine." (footnote omitted).

some of its members either were communists, communist agents, or communist sympathizers. Thus, the statements are clearly capable of a defamatory meaning, and it was error for the lower court to preclude Merton from proceeding with its case. Accordingly, we reverse the order of the lower court and remand this case for further proceedings.

One final matter merits our attention. In its opinion the lower court stated its view that, pursuant to the decisions of the United States Supreme Court in New York Times v. Sullivan, 376 U.S. 254 (1964) and Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), Merton could not recover absent proof that Kelly had made his statements "with 'actual malice' -- that is worth knowledge that [they were] false or with reckless disregard of whether [they were] false or not." New York Times v. Sullivan, 376 U.S. at 279-80. See also Gertz v. Robert Welch, Inc., 418 U.S. at 328. This was so, the court stated, because Merton, having injected itself into

the B-1 bomber controversy, was a "public figure." See Gertz v. Robert Welch, Inc. supra: Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). The lower court further stated that it did not believe Merton had met its burden of showing "actual malice" on the part of Kelly.

We are not certain why the lower court reached this issue, given its holding that the statements complained of were not defamatory as a matter of law. It is far from settled that the New York Times standard of "actual malice" applies to cases involving nonmedia defendants, such as Rockwell and Kelly. The United States Supreme Court has expressly left this question open, Hutchinson v. Proxmire, U.S. , n.16, 99 S. Ct. 2675, 2687 n. 16 (1979), and we are aware of no Pennsylvania appellate decision applying the standard to nonmedia defendants as a matter of state law. Cf. Jacron Sales

Co. v. Sindorf, 276 Md. 580, 350 A. 2d 688 (1976)(holding the New York Times standard applicable to nonmedia defendants as a matter of Maryland law). Moreover, the question of whether a given plaintiff can be deemed a "public figure" is a difficult one which has, at times, divided the United States Supreme Court. See, e.g., Wolston v. Reader's Digest Association, Inc., U.S. , 99 S. Ct. 2701 (1979); Time, Inc. v. Firestone, 424 U.S. 448 (1976).

Even assuming, arguendo, that the New York Times standard does apply to the present case, the court's conclusion that Merton failed to prove "actual malice" on the part of the defendants was premature. The case was presented to the court for decision on the pleadings alone. The record before the court was limited to the pleadings, the motions for judgment on the pleadings, and the parties' respective briefs on the motions, none of

which discussed the applicability of the constitutional privilege. The lower court was without the benefit of any other materials, such as depositions or interrogatories, to aid in determining whether Kelly knew that his statements were false or made his statements with reckless disregard of whether they were false or not. It may well be that after further proceedings the lower court will be called upon to determine the effect, if any, of the New York Times standard on the present case based on a record containing sufficient facts to decide the issue. We hold only that the lower court could not properly conclude on the limited record before it that Merton had failed to prove "actual malice" within the meaning of New York Times and its progeny.

Order reversed and case remanded for further proceedings.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

THE THOMAS MERTON CENTER, a nonprofit Pennsylvania corporation and the STOP THE B-1 BOMBER TASK FORCE OF THE THOMAS MERTON CENTER, an unincorporated nonprofit association,	:	No. GD 77-03656
Plaintiffs,	:	
v.	:	
ROCKWELL INTERNATIONAL CORPORATION, a corporation, and CROSBY M. KELLEY, an individual,	:	
Defendants.	:	

Before: Finkelhor and Del Sole, JJ.

ORDER OF COURT

AND NOW, to-wit, this 29th day of March, 1979, upon defendants' motions for judgment on the pleadings and after full consideration of the pleadings, briefs and arguments of counsel, it is hereby ORDERED, ADJUDGED and DECREED that said motions are granted and judgment shall be entered in favor of defendants, Rockwell

International Corporation and Crosby M. Kelly.

BY THE COURT:

/s/ _____

Eo Die exceptions noted to plaintiffs.

/s/ _____

I CONCUR:

/s/ _____

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

THE THOMAS MERTON CENTER, a nonprofit Pennsylvania corporation and the STOP THE B-1 BOMBER TASK FORCE OF THE THOMAS MERTON CENTER, an unincorporated nonprofit association,	:	
Plaintiffs,	:	No. GD 77-03656
v.	:	
ROCKWELL INTERNATIONAL CORPORATION, a corporation, and CROSBY M. KELLEY, an individual,	:	
Defendants.	:	

Before: Finkelhor and Del Sole, JJ,

OPINION

FINKELHOR, J. March 27, 1979

The above action in trespass for defamation came before the Court en banc on defendants' motions for judgment on the pleadings.[1] The issue is whether answers of defendants to questions posed

[1] Counsel interchanges summary judgment and judgment on the pleadings. (Pa. R.C.P. 1034, 1035)

by the news media constituted defamation of the plaintiffs.

Plaintiff Thomas Merton Center is a nonprofit Pennsylvania corporation. Plaintiff "Stop the B-1 Bomber Task Force" is an unincorporated nonprofit association consisting of those members of the Thomas Merton Center who are opposed to any expenditures or promotions regarding the B-1 bomber aircraft.

Defendant Crosby M. Kelly (Kelly) is Vice President of communications for the defendant Rockwell International Corporation.[2]

The complaint alleges that on December 21, 1976, an article appeared in the Pittsburgh Post-Gazette newspaper reporting an interview with defendant Kelly. The relevant portion of the article reads as follows:

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[2] Paragraph 5 of plaintiffs' complaint refers to Kelly as an agent of the "Plaintiff Corporation."

"A top official of Rockwell International, prime contractor for the B-1 bomber, says he's convinced the Soviet Union is secretly funding opponents of the controversial weapons project.[3]

"'Oh absolutely, oh sure,' responded Crosby M. Kelly, Vice President of communications, when asked during a lengthy interview if the Soviets were providing funds.

"Speaking from his office on the 54th floor of Rockwell headquarters in Pittsburhg [sic] last Thursday, Kelly said the firm at one time began a study to establish the degree to which the Soviets are funding the anti-bomber campaign.

. . . .

"Kelly offered no specific documentation for Soviet activity in the B-1 controversy, but he said the Institute for the Study of Conflict in London supports his thesis in general.

"Yesterday, when Kelly learned of The Associated Press' imminent story, he called from California to disclaim that he was speaking as a company official.

"'That's pretty dramatic stuff. I have no documentation to establish proof of one dime of their funding,' he said.

. . . .

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[3] It should be noted that paragraph one of the news story is not a direct quote from the defendant but the reporter's interpretation of defendant's statements.

they have been impeded in the exercise of their First Amendment right to free speech.

It is the position of both defendants in their respective motions that the complaint fails to state a claim upon which relief may be granted because 1) none of the statements in the article is, as a matter of law, defamatory or libelous and 2) the statement does not sufficiently identify plaintiffs and 3) the remarks were "fair comment" on a public issue.

We feel that the first argument is sufficient to grant defendants' motions.

A motion for summary judgment (judgment on the pleadings) may only be granted where there exists no genuine issue of material fact. The Court must accept as true all well-pleaded facts and resolve any doubts to the benefit of the non-moving party. Commonwealth v. Diamond Shamrock Chemical Co., 391 A.2d 1333 (Pa.Cmwlth.

"'I can't understand why he would say that unless it's to discredit us,' responded Stella Smetanka, assistant director of the Thomas Merton Center here, another group which Kelly singled out.

"Kelly, who calls himself an amateur student of Soviet affairs, said during the interview last week that the anti-B1 bomber efforts are being led by the Clergy and Laity Concerned and the American Friends Service Committee."

The complaint alleges that this publication:

". . . was intended to convey, and did convey to the community at large, the impression that members of the Thomas Merton Center and its subsidiary task force, 'Stop the B-1 Bomber' were Communist smypathizers, associated with Communists or were in fact Communists and it was calculated to, and did, hold [Plaintiffs] up to public scorn, hatred, ridicule... and [that] by such publication, Defendant ...meant...that the Plaintiffs...who were actively engaged in opposing the building of the 'B-1 Bomber', were communist sympathizers, associated with Communists, or Communists and same was so understood by the readers . . ."

It is plaintiffs' position that the published statement was false, the defendants failed to make any reasonable inquiry into the facts, the reputation and good standing of plaintiffs and plaintiffs' members have been injured and that

1978); Acker v. Palena, 393 A.2d 1230 (Pa. Super. 1978); Lehigh Electric Products Co., Inc. v. Pa. Nat. Mut. Cas. Ins. Co., 390 A.2d 781 (Pa.Super. 1978).

It is well settled in this Commonwealth that in an action for libel,[4] it is the duty of the trial court to determine as a matter of law whether the language or circumstances of the alleged statement is capable of a defamatory meaning and it is the function of the jury to determine whether such meaning was, in fact, attributed to them. Corabi v. Curtis Publishing Co., 441 Pa. 432, 273 A.2d 899 (1971); Fox v. Kahn, 421 Pa. 563, 221 A.2d 181 (1966); Cosgrove v. Pane, 408 Pa. 314, 182 A.2d 751 (1962); Branswine v. Norristown Herald, 351 Pa. 634, 41 A.2d 736 (1945), cert. denied 326 U.S. 724;

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[4] A defamatory publication made by oral communication which is reduced to writing is characterized as a libel.

Curran v. Philadelphia Newspapers, Inc., 395 A.2d 342 (Pa. Super. 1978); Vitteck v. Washington Broadcasting Co., Inc., 389 A.2d 1197 (Pa.Super. 1978); Doman v. Rosner, 371 A.2d 1003 (Pa.Super. 1977); Restatement (Second) of Torts §614.

A publication is defamatory if it is unprivileged and tends to harm the plaintiff's reputation and to lower him in the estimation of the community or deter others from associating with him. Volomino v. Messenger Publishing Co., 410 Pa. 611, 189 A.2d 873 (1963); Vitteck v. Washington Broadcasting Co., Inc.,supra; Restatement (Second) of Torts §559. Under Pennsylvania law, both an unincorporated nonprofit association and a nonprotif corporation have standing to maintain an action for libel. Munhall Homestead Housing Association v. Messinger Publishing Co., 25 D&C2d 1 (C.P.Allegh. 1961); Americans for Democratic Action v. Meade, 72 D&C 306 (C.P.Phil. 1950); Cf. Restatement

(Second) of Torts §561, First Caveat, §562.

In the instant case, the alleged defamatory publication claimed that the Soviet Union was funding opponents[5] of the B-1 Bomber. Assuming arguendo that the statement sufficiently identified the plaintiffs, the issue is whether it is capable of a defamatory meaning.

Prior decisions have distinguished between allegations of "Communism" as opposed to communist tendencies. Thus, characterization of an entity or person as a "Communist" or knowingly engaged in Communist activities is defamatory per se. Clark v. Allen, 415 Pa. 484, 204 A.2d 42 (1964); Matson v. Margiotti, 371 Pa. 188, 88 A.2d 892 (1952); Albert Appeal, 372 Pa. 13, 92 A.2d 663 (1952). However, the averment of "Communist tendencies"

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[5] Plaintiffs were not identified by name by Kelly's statement but the article included a statement by the Assistant Director of the Thomas Merton Center.

has been held as a matter of law not to be libelous.

As stated by former Chief Justice Bell in Clark v. Allen, 415 Pa. 484, 493:

"To summarize; It is a matter of widespread common knowledge that countless patriotic Americans sincerely and sharply disagree as to what actions and/or words and/or policies aid the Communist cause, or what show Communist tendencies, or what amounts to an "appeasement" of Communism, or what is a "pro-Communist," or exactly what is meant by the term "soft on Communism." While these words and expressions have a different meaning or meanings for very many Americans and often are undoubtedly intended to be derogatory, they are not libelous. In no other way can the menace and dangers of Communism be as clearly and succinctly brought home to the American people. To hold these words or any of said expressions libelous would realistically and practically put an effective stop to searching and illuminating discussion and debate with likely dire results. It is absolutely essential for the existence and preservation of our Country that opinions on such vitally important and highly controversial issues should be vigorously argued and debated, and this applies especially to persons in public life. Without such discussion, charges, countercharges and debate, not only our future welfare but, we repeat, our very existence as a free nation may be jeopardized or destroyed."

The alleged libel concerned allegations made by defendants against former Senator

Clark and "his A.D.A. approved voting record with its communist tendencies." (486)

If defendant Kelly had voluntarily and directly stated "The Soviet Union is secretly funding the Merton Center or the Stop the B-1 Bomber Task Force," it could conceivably be argued that the statement, on its face, was defamatory. However, Kelly's statement was an answer elicited in response to a question posed by a news reporter.

Restatement (Second) of Torts §595 reads in part as follows:

"(2) In determining whether a publication is within generally accepted standards of decent conduct it is an important factor that

> "(a) the publication is made in response to a request rather than volunteered by the publisher. . ."

The newspaper article specifically refers to defendant Rockwell as a prime contractor of the B-1 Bomber. De-

fendant's remark was not volunteered, but was only made in response to a question posed by the interviewer. Defendant did not go beyond the meager statement, "Oh absolutely, of [sic] sure." In this context, we do not believe his statement is capable of a defamatory meaning. See, Fram v. Yellow Cab Co. of Pgh., 380 F.Supp. 1314 (W.D.Pa. 1974); Restatement (Second) of Torts §599.

Finally, the Court must also consider the defense of Constitutional privilege as it relates to derogatory statements concerning a public figure or public issues, under the standard set forth in New York Times v. Sullivan, 376 U.S. 254 (1964), and extended by Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), to public issues.

It is clear that the issue of the funding of the B-1 Bomber was a matter of national concern. By voluntarily making

public their opposition to the controversial bomber, plaintiffs thrust themselves into the public area and sought to influence a public issue. Thus, under New York Times standard, plaintiffs are required to show that the statement of Kelly was made with knowledge of its falsity or in reckless disregard of its truth or falsity. 12 P.S. §1584(1)(a), (g). We do not believe plaintiffs have met this burden.

While it is conceivable that defendant, a high corporate official, should have been more cautious in answering questions posed by the news media, as evidenced by his subsequent statements of lack of proof, plaintiffs' complaint does not meet the well defined and narrow criteria of defamation. Discussion of public issues is a highly valued Constitutional right and should not be circumscribed lightly.

In view of our decision, it is not necessary to discuss the other argu-

ments raised by defendants.

Based upon the above discussion, defendants' motion for judgment on the pleadings is granted.

Opposition

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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No. 81-2000

In the Supreme Court of the United States

OCTOBER TERM, 1981

THE THOMAS MERTON CENTER,
Petitioner,
v.
ROCKWELL INTERNATIONAL CORPORATION,
and CROSBY M. KELLY,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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I. COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Should this Court review a state court decision which rests solely on the interpretation of state law.

2. Should this Court grant a petition for certiorari when the petitioner has failed to state a cognizable federal claim.

3. Should this Court review an alleged federal constitutional claim which was not raised in or considered by the state courts below.

II. COUNTERSTATEMENT OF THE CASE

This case was initiated when Petitioner, The Thomas Merton Center ("Merton"), filed a complaint for defamation under the common law of Pennsylvania against Respondents, Rockwell International Corporation[1] ("Rockwell"), a corporation, and Crosby M. Kelly ("Kelly"), an individual and Vice-President of Communications for Rockwell International Corporation, in the Court of Common Pleas of Allegheny County, Pennsylvania ("Court of Common Pleas") on February 18, 1977. In its common law defamation action, Merton sought damages against Respondents as the result of alleged comments attributed to Kelly by an Associated Press reporter in a newspaper article published in the *Pittsburgh Post-Gazette* on December 21, 1976.

Respondents denied the allegations contained in the complaint filed by Merton and moved for judgment on the pleadings, which motion was granted by the Court of Common Pleas on March 27, 1979, on the sole ground that the statements allegedly made by Kelly were not capable of a defamatory or libelous meaning under Pennsylvania law.[2] Pet. App. at 38a and 41a. On appeal to the Superior Court of Pennsylvania ("Superior Court"), an intermediate appellate court, the Court of Common Pleas was reversed on its interpretation of Pennsylvania law and the case was remanded to the lower court for further proceedings. Respondents appealed the Superior Court's decision and on August 8, 1980, the Supreme Court of Pennsylvania, the highest state court, reversed the Superior

[1]Rockwell has no corporate parent. A complete list of all subsidiaries and affiliates has been attached to the Entry of Appearance submitted by counsel for Rockwell. *See* U.S. Sup. Ct. Rule 28.1.

[2]The opinion of the Supreme Court of Pennsylvania from which certiorari is sought, the opinion of the Superior Court of Pennsylvania and the opinion of the Court of Common Pleas of Allegheny County, Pennsylvania are reported in the Appendix to the Petition for Certiorari, beginning at 2a, 15a and 29a, respectively. All references herein to "Pet. App." are to the Appendix to the Petition for Certiorari.

Court and reinstated the judgment of the Court of Common Pleas in favor of Respondent. Interpreting its prior state law decisions, the Supreme Court of Pennsylvania premised its reinstatement of judgment in favor of Respondents wholly upon a determination that the alleged statements complained of by Merton were not defamatory as a matter of Pennsylvania law. Pet. App. at 12a.

Merton's Application for Reargument was denied by the Supreme Court of Pennsylvania on January 29, 1982.

On April 27, 1982, Merton filed its Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania ("Petition for Certiorari").

III. ARGUMENT

A. This Court Should Deny Merton's Petition For Certiorari Because The Decision Of The Supreme Court of Pennsylvania Is Based Entirely on State Law.

It is well settled that the jurisdiction of this Court, as defined by Article III §2 of the Constitution and presently codified in 28 U.S.C. §1257(3) (1976), to review decisions of the state courts by writ of certiorari does not extend to state court judgments which are based entirely on state law. *See Chandler v. Florida,* 449 U.S. 560, 570 (1981); *Herb v. Pitcairn,* 324 U.S. 117, 125-26 (1945); *Murdock v. City of Memphis,* 87 U.S. (20 Wall.) 590, 626 (1875). Indeed, this Court has long acknowledged that it lacks the authority to review state court judgments on questions of substantive state law. *Henry v. Mississippi,* 379 U.S. 443, 447 (1965); *Herb v. Pitcairn,* 324 U.S. at 125-26; *Murdock v. City of Memphis,* 87 U.S. at 626. A challenge to a state court decision on the grounds that the state court has rendered an erroneous decision on questions of state law, or has ruled in a manner inconsistent with prior state law, does not confer jurisdiction on this Court. *Brinkerhoff-Faris Trust & Savings Company v. Hill,* 281 U.S. 673 (1930); *Enter-*

prise Irrigation District v. Farmers Mutual Canal Company, 243 U.S. 157 (1917).

A review of the opinion of the Supreme Court of Pennsylvania below unequivocally demonstrates that that court's decision was anchored *exclusively* on its interpretation of Pennsylvania's law of defamation. In its opinion, the Supreme Court of Pennsylvania emphasized that the entire controversy presented by this case centered solely on a determination as to whether or not the statements attributed to Kelly were capable of a defamatory meaning under the applicable Pennsylvania law. Pet. App. at 6a and 7a.

In reaching its decision in favor of Respondents in this case, the Supreme Court of Pennsylvania relied upon its prior state law decision in the case of *Clark v. Allen*, 415 Pa. 484 (1964), to conclude that "Our case law makes clear that Kelly's failure to charge or imply [Merton's] knowing participation ...is fatal to [Merton's] effort to establish that Kelly's statements are actionable." Pet. App. at 10a. At no point in its opinion did the court rely upon or even discuss any federal constitutional or statutory issue whatsoever. Thus, there can be no doubt but that the present case was decided below purely as a matter of state law.

Accordingly, the judgment of the Supreme Court of Pennsylvania below is not properly subject to review by this Court inasmuch as it was premised solely and exclusively on Pennsylvania state law. Merton's Petition for Certiorari is tantamount to a request that this Court review the defamation law of Pennsylvania and reverse the highest court of that state concerning the meaning of that law. Such a request is manifestly improper and should be denied.

B. Merton's Petition for Certiorari Fails to State a Cognizable Federal Claim.

Under the parameters of 28 U.S.C. §1257(3) (1976), it is fundamental that in order to properly invoke the jurisdiction

of this Court to review a state court judgment by writ of certiorari, the state court proceeding from which certiorari is sought must, at a minimum, have involved a substantial federal claim or question arising under the Constitution, treaties or laws of the United States. In addition, the federal claim or question must have been presented to the state court with particularity by "averments so distinct and positive as to place it beyond question that the party...intended to assert a Federal right." *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 655 (1897).

In its Petition for Certiorari, Merton asserts that the state court proceeding below properly encompassed a federal constitutional claim raised by it, *to wit*, that the statements attributed to Respondents impeded the "free speech" rights of its members.[3] Pet. at 11. However, this vague allegation of an impediment to "free speech" rights fails to identify or assert the precise nature, federal or state, of the rights allegedly infringed.[4] Moreover, there is no evidence in any of the opinions of the lower courts to suggest that Merton's alleged federal claim was ever considered or discussed below. Under the foregoing circumstances, Merton's claim below is wholly inadequate to invoke the jurisdiction of this Court. *See Herndon v. Georgia*, 295 U.S. 441 (1935); *Harding v. Illinois*, 196 U.S. 78 (1904).

Furthermore, even if Merton had framed its claim under the First and Fourteenth Amendments, it would not have presented a cognizable federal constitutional question inas-

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[3]As will be discussed at page 6, Merton failed, in any event, to timely raise or advance this alleged federal constitutional issue in any of the Pennsylvania courts below.

[4]In *New York Central & H. R. Co. v. New York*, 186 U.S. 269 (1902), this Court noted in discussing the proper formulation of a federal claim that "it is well settled in this court that it must be made to appear that some provision of the Federal, as distinguished from the state, Constitution was relied upon, and that such provision must be set forth." *Id.* at 273.

much as the alleged impediment of free speech was purportedly accomplished by the actions of private parties. It is an elemental precept of constitutional law that the guarantee of free speech provided by the First Amendment is a guarantee only against abridgement by governmental entities or persons acting under color of governmental authority. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 567 (1972). *See Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). Accordingly, this Court has consistently held that the proscriptions of the First and Fourteenth Amendments do not extend to private conduct. *See e.g., Hudgens v. NLRB*, 424 U.S. 507 (1976); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Civil Rights Cases*, 109 U.S. 3 (1883).

Neither Rockwell nor Kelly are agents or instrumentalities of the Commonwealth of Pennsylvania, the federal government or the government of any other state, and Merton has never alleged to the contrary. Thus, the alleged conduct of Respondents cannot, in any event, be characterized as a constitutional infringement of the First Amendment rights of Merton's members.

Merton's attempt to frame a cognizable federal claim falls fatally short of the jurisdictional requirement for review imposed by Section 1257(3) of Title 28, U.S. Code. Merton has simply not presented a federal question for this Court to review.

C. Merton's Petition for Certiorari Should be Denied Because Merton Failed to Raise its Alleged Federal Question Below.

Even assuming *arguendo* that Merton has formulated a cognizable federal constitutional claim, its request that this Court rule on that claim is untimely. The proper and timely raising of a federal question in the proceedings below is a jurisdictional prerequisite for review of a state court decision

by this Court. 28 U.S.C. §1257 (1976). *See also Cardinale v. Louisiana,* 394 U.S. 437 (1969); *Godchaux Co. v. Estopinal,* 251 U.S. 179 (1919).

Where, as in the present case, the highest state court fails to rule on or even discuss the federal question upon which a request for certiorari is predicated, the party invoking the Court's jurisdiction has the burden of establishing that the federal question was properly presented and preserved below. *Street v. New York,* 394 U.S. 576 (1969); *Bailey v. Anderson,* 326 U.S. 203 (1945). In discharging this burden, Rule 21 of this Court requires that the petitioner "specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised...[and] the method or manner of raising them...." U.S. Sup. Ct. Rule 21.1(h). Contrary to Merton's bald assertion that its alleged federal question was presented and discussed by the Pennsylvania courts, Pet. at 11, there is nothing in the opinions of the lower courts or the court papers of this case which even remotely suggests that Merton ever presented the courts below with a federal claim.[5]

At the trial court level, a review of Merton's Memorandum in Opposition to Defendants' Motion for Summary Judgment ("Memorandum") demonstrates that Merton failed to raise or advance any federal claim or issue whatsoever,[6] even

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[5]The only federal issues raised in the instant case were *Respondent's* free speech defenses to Merton's defamation action.

[6]Merton's Memorandum was intially filed with the Court of Common Pleas and is properly part of the court papers on file with the Supreme Court of Pennsylvania. All references herein to "Mem." are to Merton's Memorandum in Opposition to Defendant's Motion for Summary Judgment. Also, the Brief for Appellant filed by Merton in support of its appeal to the Superior Court and the Brief of Appellee, The Thomas Merton Center, to the Supreme Court of Pennsylvania are part of the court papers on file with the Supreme Court of Pennsylvania. All references herein to "Brief" and "Sup. Brief" are to Merton's Brief for Appellant and the Brief of Appellee, The Thomas Merton Center, respectively.

when faced with complete dismissal of its action for failure to state a claim upon which relief could be granted. In fact, in its Memorandum, Merton argued only that its complaint stated an adequate claim for defamation under Pennsylvania law. Mem. at 2 and 6.

Similarly, on appeal to the Superior Court, Merton raised only the following issues:

(1) Did the Court below err when it found that a Statement that an organization protesting a proposed weapons system being funded by the Soviet Union was incapable of a libelous interpretation?

(2) Where an article notes that the speaker of a defamatory statement singled out a particular organization is this sufficient identification to make the defamatory statement actionable by that organization?

(3) What constitutes "fair comment" on a public issue?

Brief at 2.

None of the foregoing issues involved or encompassed a federal claim by Merton. The two former issues embodied state law considerations and the latter issue concerned only the "fair comment" defense asserted by Respondents in the trial court.

Unsurprisingly, neither the opinion of the Court of Common Pleas nor the opinion of the Superior Court reflect any discussion or consideration of any federal claim pertaining to Merton.

A review of Merton's brief to the Supreme Court of Pennsylvania and that court's opinion, Pet. App. at 2a, further confirms that Merton failed to present or assert any federal claim. Moreover, in light of its failure to raise a federal claim or issue in either the Court of Common Pleas or the Superior Court, Merton would have been precluded by Pennsylvania procedural law from doing so on appeal to the Supreme Court

of Pennsylvania. *See Doner v. Jowitt and Rodgers Co.*, 484 Pa. 496 (1979); *Policino v. Ehrlich*, 478 Pa. 5 (1978); *Solomon v. Corleto*, 20 Pa. Commw. Ct. 361 (1975).

In light of the foregoing, it is understandable why Merton's Petition for Certiorari is devoid of any citation to the record which would indicate that it presented the alleged federal issue asserted in its Petition for Certiorari to any of the Pennsylvania courts below. Consequently, Merton's failure to properly raise its alleged federal constitutional claim in the state courts below precludes this Court from granting certiorari in order to address that claim now. This Court "cannot decide issues raised for the first time here." *Tacon v. Arizona*, 410 U.S. 351, 352 (1973).

IV. CONCLUSION

For the reasons set forth, Rockwell International Corporation and Crosby M. Kelly respectfully request that this Court deny Merton's Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania.

Respectfully submitted,
KIRKPATRICK, LOCKHART,
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CERTIFICATE OF SERVICE

I, Joseph A. Katarincic, counsel for Respondent Rockwell International Corporation, hereby certify that I served three (3) true and correct copies of the within Brief In Opposition To Petition For Certiorari, on counsel for the Petitioner by first-class United States Mail, postage prepaid, on the 28th day of May, 1982, in care of the following address:

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